No. 98-1111-CFX Title: Texas, et al., Petitioners
v.
Francois Daniel Lesage and United States

Docketed: January 12, 1999 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jan 11 1999	Petition for writ of certiorari filed. (Response due April 14, 1999)
	Feb 4 1999	Order extending time to file response to petition until March 15, 1999.
	Feb 11 1999	Waiver of right of respondent Franocois D. Lesage to respond filed.
	Mar 11 1999	Order further extending time to file response to petition until April 14, 1999.
	Apr 14 1999	Brief of respondent United States in opposition filed.
	Apr 14 1999	Lodging Consisting of Ten Copies of the Lower Court Decision Submitted by the Solicitor General.
	Apr 27 1999	DISTRIBUTED. May 13, 1999
	May 12 1999	Response requested.
	Jun 11 1999	Brief of respondent Francois D. Lesage in opposition filed.
	Jun 23 1999	REDISTRIBUTED. September 27, 1999
	Oct 4 1999	REDISTRIBUTED. October 8, 1999
	Oct 5 1999	Record requested.
	Oct 22 1999	Record filed.
	Oct 25 1999	Record filed.
	Oct 27 1999	REDISTRIBUTED. November 12, 1999
	Nov 9 1999	REDISTRIBUTED. November 12, 1999
	Nov 19 1999	REDISTRIBUTED. November 24, 1999
	Nov 29 1999	Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam. (Detached opinion.)
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	Dec 3 1999	Records returned to USCA 5th Circuit- 1 box
	Dec 29 1999	JUDGMENT ISSUED.
	Jan 4 2000	CORRECTED JUDGMENT ISSUED.

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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

STATE OF TEXAS; UNIVERSITY OF TEXAS SYSTEM; BERNARD RAPOPORT; THOMAS O. HICKS; MARTHA SMILEY; LINNET DEILY; DONALD EVANS; ZAN HOLMES, JR.; LOWELL LEBERMANN; TOM LOEFFLER; ELLEN CLARKE TEMPLE; UNIVERSITY OF TEXAS AT AUSTIN; ROBERT BERDAHL; COLLEGE OF EDUCATION; MANUEL JUSTIZ, FRANK WICKER, WILLIAM CUNNINGHAM,
Petitioners,

v.

FRANCOIS DANIEL LESAGE,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In a Title VI suit, by merely introducing evidence of an affirmative action plan may a plaintiff create a presumption of discrimination precluding summary judgment and thereby imposing on non-minority plaintiffs complaining of "reverse" discrimination a lighter burden than is placed on minority plaintiffs?

2. Is the *Mt. Healthy* affirmative defense a complete bar to liability or, as the Fifth Circuit held, merely a limitation on damages?

3. Did Congress lack the authority to abrogate the States' Eleventh Amendment immunity pursuant to Title VI?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION TO CASE AS REPORTED BELOW vi

STATEMENT OF JURISDICTION vii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

1. THE FIFTH CIRCUIT'S DECISION CONFLICTS SHARPLY WITH THE STANDARDS ENUNCIATED BY THIS COURT BY TREATING AN AFFIRMATIVE ACTION PLAN AS CREATING A PRESUMPTION OF DISCRIMINATION. 7

2. THE COURT OF APPEALS HAS ATTEMPTED TO CHANGE THE *MT. HEALTHY* AFFIRMATIVE DEFENSE FROM ONE PRECLUDING LIABILITY TO ONE LIMITING DAMAGES. ... 10

3. BECAUSE TITLE VI WAS ENACTED PURSUANT TO THE SPENDING CLAUSE, CONGRESS LACKED THE AUTHORITY TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY WHEN IT ENACTED TITLE VI. 14

CONCLUSION 18

APPENDIX

TABLE OF AUTHORITIES

CASES — PAGE

Adarand Constructors , Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995) 11,13

Aramburu v. Boeing Co, 112 F.3d 1398 (10th Cir. 1997) 9

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142 (1985) 15

Bashir v. Supreme Court of Ohio, 652 F.2d 641 (6th Cir. 1981) 14

Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079 (6th Cir. 1996) 9

Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr, 518 U.S. 668, 675, 116 S.Ct. 2342 (1996) 12

Brunet v. City of Columbus, 1 F.3d 390, (6th Cir. 1993), *cert. denied*, 510 U.S. 1164, 114 S.Ct. 1190 (1994) 13

City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157 (1997) 16

Crim v. Board of Educ. Of Cairo School Dist. No. 1, 147 F.3d 535 (7th Cir. 1998) 9

Doherty v. Rutgers School of Law-Newark, 651 F.2d 893 (3rd Cir. 1981) 14

Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 938 (1992) 14

Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 112 S. Ct. 1028 (1992) 14

Fulani v. Bentsen, 35 F.3d 49 (2nd Cir. 1994) 14

Ghane v. West, 148 F.3d 979 (8th Cir. 1998) 9

Guardians Ass'n v. Civil Serv. Comm., 463 U.S. 582, 103 S.Ct. 3221 (1983), *cert denied.* 463 U.S. 1228, 103 S.Ct. 3568 (1983) 14

Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671 (1980) 13

Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997) 9

Hopwood v. State of Texas, 158 F.3d 213
(5th Cir. 1998) 13,14
Lesage v. State of Texas, et al., 158 F.3d 213
(5th Cir. 1998) ..... vi, 11,15, 16
Litman v. George Mason University, 5 F.Supp.2d 366
(E.D. Va. 1998) 16
Mooney v. Aramco Services Co., 54 F.3d 1207
(5th Cir. 1995) 10
Mt. Healthy School Dist. v. Doyle, 429 U.S. 274,
97 Sup. Ct. 568 (1977) i,6,10,11,12
Nichols v. Loral Vought Systems Corp., 81 F.3d 38
(5th Cir. 1996) 10
Pennhurst State School and Hospital v. Halderman,
451 U.S. 1, 101 S.Ct. 1531 (1981) 17
Price Waterhouse v. Hopkins, 490 U.S. 228,
109 S.Ct. 1775 (1989) 13
Quarles v. Oxford Municipal Separate School Dist.,
868 F.2d 750 (5th Cir. 1989) 7
Regents of the University of California v. Bakke,
438 U.S. 265, 98 S.Ct. 2733 (1978) 13
Seminole Tribe of Florida v. Florida, 517 U.S. 44,
116 S.Ct. 1114 (1996) 14,15,16
St. Mary's Honor Center v. Hicks, 529 U.S. 502,
113 S. Ct. 2742 (1993) 6,7,8,10
Steward Mach. Co. v. Davis, 301 U.S. 548,
57 S.Ct. 883, (1937) 15
Swanson v. General Services Adm., 110 F.3d 1180
(5th Cir. 1997) *cert denied*, 118 S.Ct. 366 (1997) 9
United Steelworkers v. Weber, 443 U.S. 193,
99 S.Ct. 2721 (1979) 14
*Village of Arlington Heights v. Metropolitan
Housing Development Corp.*, 429 U.S. 252, 271,
97 S.Ct. 555 (1977) 13
Wilson v. Glenwood Intermountain Properties, Inc.,
98 F.3d 590 (10th Cir. 1996) 13

STATUTES

28 U.S.C. § 1254(1) vii
42 U.S.C. § 1981 5
42 U.S.C. § 1983 5
42 U.S.C. § 2000d 2,5
42 U.S.C. § 2000d-7 15,17
42 U.S.C. § 2000d-7(a)(1) 2
42 U.S.C.A. § 2000e-2(m) 13
42 U.S.C.A. § 2000e-5(g)(2)(B) 13

CONSTITUTIONAL PROVISIONS

U.S. Const., Fourteenth Amendment, § 1 1,16
U.S. Const., Fourteenth Amendment, § 5 2,7,16,17

CITATION TO CASE AS REPORTED BELOW

The opinion of the United States Court of Appeals for the Fifth Judicial Circuit in this case may be found at *Lesage v. State of Texas, et al.*, 158 F.3d 213 (5th Cir. 1998), and is reprinted at App. A, 1-19. The opinion and final judgment of the district court is unpublished, and may be found reprinted at App. A, 20-29.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on October 13, 1998. Appendix A-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF TEXAS; UNIVERSITY OF TEXAS SYSTEM; BERNARD RAPOPORT; THOMAS O. HICKS; MARTHA SMILEY; LINNET DEILY; DONALD EVANS; ZAN HOLMES, JR.; LOWELL LEBERMANN; TOM LOEFFLER; ELLEN CLARKE TEMPLE; UNIVERSITY OF TEXAS AT AUSTIN; ROBERT BERDAHL; COLLEGE OF EDUCATION; MANUEL JUSTIZ, FRANK WICKER, WILLIAM CUNNINGHAM,

Petitioners,

v.

FRANCOIS DANIEL LESAGE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Fourteenth Amendment, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., Fourteenth Amendment, § 5:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000d (Title VI):

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1):

A State shall not be immune under the Eleventh Amendment of the Constitution of the Unite States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. § 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C.A. § 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

STATEMENT OF THE CASE

The Department of Education at the University of Texas has two Ph.D. programs, one in school psychology and one in counseling psychology. Francois Lesage applied to the counseling psychology program for admission for the 1996-97 academic year. The counseling psychology program is a well respected program, receiving high caliber applications from across the United States and overseas. The program receives approximately 250

applications each year for roughly 12 slots, or about 20 applications for each available opening in the incoming class.

The admissions committee reviewing applications for the Fall 1996 incoming class was composed of Dr. Frank Richardson and Dr. Ricardo Ainslie. Richardson and Ainslie made the first review of the applications, narrowing the applicant pool from approximately 220 applications to approximately 40. Applicants were reviewed initially on four criteria: undergraduate grade point average (GPA), their score on the Graduate Record Exam (GRE), their "personal statement" of experiences, goals, and interest in the counseling psychology program, and their letters of recommendation.

Applications were first reviewed to verify that they met the minimum requirements of the Graduate School at UT: a GRE of at least 1,000 and an undergraduate GPA of 3.0. The admissions committee next assessed whether the applicants had obtained the somewhat higher program threshold of a GPA of 3.2 or 3.3, and a GRE of 1,100.

The applicant's personal statement played a major role in the admissions committee's decision and demonstrates the highly intuitive and academic nature of the selection process. The committee evaluates the personal statements for evidence of maturity, motivation and creativity and for special qualities of intellect and imagination. In addition to searching for the above qualities, the committee also attempted to detect possible indications of less desirable qualities that will generally result in dropping an application out of serious consideration. Those negative qualities include, *inter alia*, an excessive attachment to ideology, an inappropriate need for authority, an "excessive" desire to "save" others, an inflated sense of the importance of psychology, an excessive self-preoccupation, and other personal idiosyncracies that might make it difficult for the student to work with others in the field.

Finally, the committee reviews the letters of recommendation submitted by the applicants' references, evaluating how well the writer knew the applicant, the reputation of the writer, as well as the statements from the writer that convincingly indicate that the applicant has special qualities of some kind, *e.g.*, intellect, leadership, maturity, character, creativity, or imagination.

Although the GPA and GRE scores are only two of several criteria used by the admissions committee for admissions decisions, they are somewhat more "objective" measures. Based on the scores provided by the Graduate School at the University, the average undergraduate GPA of the applicants for the 1996 Fall semester incoming class in counseling psychology was 3.58; the average GRE score (the graduate school analogue to the Scholastic Aptitude Test or SAT) for the applicant pool in counseling psychology was 1,177. Offers of admission were extended to 16 candidates. Of those, 14 accepted and are currently enrolled at UT; two declined, presumably accepting an offer of admission at another institution. The average undergraduate GPA of the students offered admission, 3.56, was similar to the overall average applicant pool; the average GRE score was 1,242. Broken down by race, the GPA of the majority (Anglo) students accepting the offer of admission was 3.65, and their average GRE was 1,279. The average GPA of the minority students accepting the offer of admission was 3.45, and the average GRE was 1,186.

Lesage was denied admission. His GPA (again, as reported by the Graduate School) was 3.66, and his GRE was 1030. Eighty (80) applicants had a GPA higher than Lesage. One hundred and fifty two (152) applicants had a higher GRE than Lesage. Seventy-three (73) applicants had both a higher GPA and GRE than Lesage. His personal statement was reviewed by a committee member who testified that it was "quite limited and underdeveloped" with one line about work that had a potential for being counseling related, but was left undescribed, as well as being poorly worded and replete with mis-spellings. App. A, 24. Lesage's letters of recommendation were considered weak. *Id.*

Sometime after February 15, 1996, Lesage learned that a black undergraduate at the University of Texas had been offered admission. Lesage immediately went to the department and was advised his application had been denied. Although Lesage did not know the black student's GRE scores or GPA, Lesage believed that he, Lesage, was a better student, and that his denial of admission must have been because of considerations of race. Lesage then filed suit two months later in April of 1996. Lesage alleged violations of 42 U.S.C. §§ 1981, 1983, and 2000d.

On motion for summary judgment, the defendants testified that "diversity" factors such as race and gender were considered after the pool of applicants was reduced to approximately forty. They also testified that Lesage's application was eliminated prior to the utilization of diversity factors. Lesage does not dispute that his application was eliminated as part of the committee's reduction of the applicant pool to forty; he disputes the defendants' contention that race was not considered prior to this last stage.

As part of defendants' summary judgment evidence, committee member Ainslee reviewed the strongest 40 applications and summarized his assessment of their strengths and contrasted them with Lesage's application. Ainslee testified that at least twenty non-minority applicants had submitted far stronger applications than Lesage. This testimony was unrebutted by Lesage.

The district court held that Lesage had not established a prima facie case that he had been discriminated against on the basis of race. The court held that the defendants had established that Lesage's application was eliminated prior to any use of race as a criterion. The district court also held that the defendants had conclusively established that Lesage's application would not have been accepted, even in the absence of the University's affirmative action plan, and that the defendants would have rejected Lesage's application in any event. The district court granted defendants' motion for summary judgment and dismissed Lesage's lawsuit.

Lesage appealed, and the Fifth Circuit Court of Appeals reversed and remanded. The court of appeals determined that certain deposition testimony by defendant Richardson created a fact question regarding whether race as a criterion was applied to Lesage's application. The court of appeals then rejected the district court's finding that the defendants had established their affirmative defense by holding that the second prong of *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), applies only to damages, not to liability.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's opinion in this case attempts to dramatically change the landscape in race discrimination cases involving affirmative action policies by modifying the standard for showing pretext in intentional race discrimination cases in a manner that conflicts with this Court's standard as set forth in *St. Mary's Honor Center v. Hicks*, 529 U.S. 502, 113 S.Ct. 2742 (1993). Petitioners believe that this holding has created a split among the circuits.

In addition, the Fifth Circuit rewrote the affirmative defense established by this Court in *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977), in which the Court held that a defendant was entitled to judgment if it could show that the decision would have occurred irrespective of the alleged violation. Contrary to the Court's decision in *Mt. Healthy* and the pronouncements of other circuits, however, the panel in this case ruled that such evidence goes only to the issue of damages and is not an affirmative defense to liability.

Moreover, the Fifth Circuit ignored previous pronouncements by the Court that Title VI of the Civil Rights Act was enacted pursuant to the Spending Clause and held that Congress could properly and did abrogate the States' Eleventh Amendment

immunity as to Title VI suits pursuant to § 5 of the Fourteenth Amendment.

1. THE FIFTH CIRCUIT'S DECISION CONFLICTS SHARPLY WITH THE STANDARDS ENUNCIATED BY THIS COURT BY TREATING AN AFFIRMATIVE ACTION PLAN AS CREATING A PRESUMPTION OF DISCRIMINATION.

The court of appeals has created a standard for summary judgment that elevates the mere recognition of diversity as valuable in a clinical psychology program to a material fact question sufficient to defeat summary judgment without requiring any evidence that it was actually used in the admission decision. Contrary to the standards handed down by this Court, the Fifth Circuit's reasoning creates a presumption of discrimination based on the existence of an affirmative action plan alone sufficient to preclude summary judgment and thereby imposes on non-minority plaintiffs complaining of "reverse" discrimination a lighter burden than is placed on minority plaintiffs.

For claims brought under Title VI, the Fifth Circuit employs the burden-shifting analysis of Title VII when analyzing evidence of intent in the context of motions for summary judgment. *Quarles v. Oxford Municipal Separate School Dist.*, 868 F.2d 750, 754 n.3 (5th Cir. 1989). This Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993), clarified the current burden-shifting federal standard under which Title VII discrimination claims are to be judged. Following introduction of the plaintiff's prima facie case of discrimination, the defendant must articulate a legitimate, non-discriminatory reason for the adverse action. *Hicks*, 509 U.S. at 506-07, 113 S.Ct. at 2747. If the defendant meets this burden, the scheme of shifting burdens and the presumption "simply drops out of the picture." *Id.* at 511, 113 S.Ct. at 2749. To overcome the defendant's articulated justification, the plaintiff must prove that the defendant's "proffered reason was not the true reason for the [adverse] decision." *Id.* at 508, 113 S.Ct. at 2747. According to *Hicks*, a

defendant's proffered reason for making the adverse decision at issue "cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, *and that discrimination was the real reason.*" *Id.* at 515, 113 S.Ct. at 2752 (emphasis added).

The Fifth Circuit reviewed the evidence supplied by the University in support of its motion for summary judgment. App. A,11-14. In it, the University explained how the applications were reviewed, and that the applicant pool was reduced from 223 to 40 prior to any explicit use of race or gender. The University tendered evidence that objective test scores and subjective evaluations of recommendations, personal statements on career goals, and unusual elements of their undergraduate curriculum were the bases for eliminating those applicants. *Id.* The summary judgment evidence presented by the University demonstrated race was not applied as an admission factor until the pool was reduced to 40. Up to that point, Lesage's application was "in the mix" with all the rest and evaluated similarly. *Id.* Lesage's only "evidence" to rebut the University's proffered reasons is the deposition testimony of Dr. Richardson that he was "very sensitive" to the issue of diversity. App. A, 12 & n.7. There was no evidence tending to indicate that the affirmative action plan had any bearing on the decision to reject Lesage's application.

Under *Hicks*, Lesage presented no evidence to raise a genuine issue of fact regarding the actual use of race at the stage of the admissions process at which Lesage's application was excluded from consideration. The panel opinion, however, treats the existence of the affirmative action plan as raising an irrebuttable presumption of discrimination against non-minorities sufficient to automatically refute the University's legitimate and undisputed non-discriminatory reasons for its admissions decision and preclude summary judgment.

That holding is not only contrary to *Hicks*, but it also conflicts with its application in other circuits. Minority plaintiffs claiming

discrimination under Title VII in other circuits have been required to show a more direct link between agency-wide or company-wide practices and their own circumstances in order to show pretext and thereby rebut the employer's rationale. *See Ghane v. West*, 148 F.3d 979 (8th Cir. 1998) (Iranian plaintiff failed to show that his employer's proffered reasons for discharging him, including that he failed to meet project deadlines and that his written communications required extensive revisions, were pretext for race or national origin discrimination; employee complained only that non-Iranian employees suffered from same work deficiencies and that he was called an "Iranian" by a coworker); *Crim v. Board of Educ. Of Cairo School Dist. No. 1*, 147 F.3d 535 (7th Cir. 1998) (black school superintendent failed to show that school board's reasons for not renewing his contract were pretext for race discrimination despite his argument contesting accuracy of some facts upon which board relied in making decision; each reason given in decision had some basis in fact and demonstrated board's dissatisfaction with his performance); *Aramburu v. Boeing Co*, 112 F.3d 1398 (10th Cir. 1997) (Mexican plaintiff's evidence that other employees were not terminated for similar violations of work rules was insufficient to show pretext); *Holifield v. Reno*, 115 F.3d 1555 (11th Cir. 1997) (black doctor failed to show pretext in race discrimination claim by asserting that his supervisors documented untrue assessments of his performance); *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079 (6th Cir. 1996) (Indian doctor who claimed race discrimination where hospital gave director of neonatology position to another candidate failed to show that hospital's proffered reasons were pretextual; discriminatory remarks made by non-decisionmakers were properly discounted by district court and statements allegedly made to neonatologist about hospital's discriminatory motives were merely conclusory).

Previously, plaintiffs claiming race and age discrimination in the Fifth Circuit have faced complete exclusion of the same kind of evidence on which the court of appeals relied to revive Lesage's claims. *See Swanson v. General Services Adm.*, 110 F.3d 1180 (5th Cir. 1997) *cert denied*, 118 S.Ct. 366 (1997) (in black

plaintiff's Title VII claim, other black employees who would testify about discrimination they experienced were properly excluded because they did not work in plaintiff's office "and could not testify to Swanson's work environment . . . or to his relations with [his supervisor]"); *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38 (5th Cir. 1996) (allegedly discriminatory remarks by supervisor who was not the relevant decision-maker as to plaintiff were not probative); *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995) ("Testimony of anecdotal witnesses with different supervisors working in different parts of the company was simply too attenuated" to show pretext).

The Fifth Circuit's ruling assumes a connection between an affirmative action plan and discrimination that does not necessarily (and in this case does not in fact) exist. The panel opinion did not recite any evidence rebutting the particular reasons listed by the defendants and the district court for the decision to eliminate Lesage and 180 other applicants. It was enough that Lesage had evidence of affirmative action in the admission decisions, even though Lesage himself had already been excluded from consideration. Contrary to *Hicks* and decisions in other circuits, the Fifth Circuit's decision creates a lighter burden for non-minority plaintiffs complaining of discrimination than for minority plaintiffs making similar claims by allowing evidence of the use of an affirmative action plan as evidence of actual discrimination, even though there is no evidence that affirmative action played any part in the decision to reject Lesage's application.

2. THE COURT OF APPEALS HAS ATTEMPTED TO CHANGE THE *MT. HEALTHY* AFFIRMATIVE DEFENSE FROM ONE PRECLUDING LIABILITY TO ONE LIMITING DAMAGES.

After reversing the district court's finding that Lesage had not established his prima facie case of discrimination, the court of appeals then addressed Petitioners' affirmative defense that the decision to deny Lesage admission would have occurred

irrespective of any constitutional deprivation. *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 284-86, 97 S.Ct. 568, 574-76 (1977). Petitioners presented the district court with conclusive and undisputed evidence that Lesage would not have been admitted to the program with or without affirmative action. That evidence included affidavits from two members of the admissions committee, an independent evaluation of the applications of more than twenty strong candidates for admission using the criteria of the admissions committee, a similar evaluation of Lesage's application, and the supporting application material. Petitioners established that Lesage's application was inferior to far more applications than there were openings in the incoming class. App. A, 23-24, 27. Lesage did not and could not present any evidence creating a genuine issue of material fact, and the court of appeals never suggested that he did. Instead, the court of appeals ruled that the absence of this evidence was irrelevant. *Lesage*, 158 F.3d at 222.

Relying on *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 115 S.Ct. 2097, 2105 (1995), the court of appeals held that the injury "in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" *Lesage*, 158 F.3d at 222. The fact that the same decision would have been made anyway in the absence of affirmative action, the court said, would not defeat liability, but only limit damages. In the view of the court of appeals, the "proper ordering of matters" before it was the determination of liability, and only then should the district court review the competitiveness of the applications pertaining to the question of damages. *Id.* The practical consequence of the court of appeals' decision is that plaintiffs such as Lesage can have standing to seek damages simply for filling out an application to graduate school.

The University of Texas provided the district court with summary judgment evidence of at least thirty (30) applicants for the same incoming class with significantly stronger credentials who were denied admission, with more than twenty (20) being

non-minority. These applicants had not only far stronger GRE scores or undergraduate GPA's than Lesage, but many had masters degrees in related fields, with some of these at 4.0 graduate grade point averages. The University supplied affidavit testimony by a committee member who had originally evaluated those same applications – testimony which detailed the superior subjective qualifications of those candidates, and which contrasted the qualifications of these individuals with Lesage's poor qualifications. In fact, the University introduced summary judgment evidence that Lesage's application was so poor that it raised concerns on the committee about whether Lesage was even suitable for counseling psychology, rather than merely not competitive. As this evidence was unrebutted by the plaintiff, the University proved conclusively that Lesage would not have been admitted, regardless of the use of race as an admissions criterion. App. A, 27.

The court of appeals held that the mere existence of an affirmative action plan creates a classification system that operates to cause unequal constitutional footing for university applicants, regardless of whether the plan operates to exclude a candidate or even is applied to a candidate. If the court of appeals' decision stands, a plaintiff would be entitled to claim relief if he establishes just the first prong of the *Mt. Healthy* test, regardless of whether the defendants can establish the second prong. *Mt. Healthy*, 429 U.S. at 284-86, 97 S.Ct. at 574-76. He would be "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285, 97 S.Ct. at 575.

This Court has consistently reaffirmed the basic *Mt. Healthy* test that defendants can avoid liability on constitutional claims by meeting their burden of establishing that the plaintiff can show no ill consequence of the alleged deprivation. *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 675, 116 S.Ct. 2342, 2347 (1996)("the government can escape liability by showing that it would have taken the same

action even in the absence of the protected conduct"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247-49, 109 S.Ct. 1775, 1789-90 (1989)[1]; *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733 (1978)("Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result."); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 271, 97 S.Ct. 555, 566 (1977).

The Fifth Circuit has inappropriately extended *Adarand* in which this Court found that the petitioner had standing for challenging the future use of race-based subcontractor compensation clauses irrespective of establishing damages. The case at bar differs from *Adarand* because there is no allegation that the department of counseling psychology continues to use race-based admissions subsequent to the Fifth Circuit's *Hopwood v. State of Texas* decision. 158 F.3d 213 (5th Cir. 1998).

The decision of the Fifth Circuit is in conflict with several other appellate decisions holding that a plaintiff must demonstrate that the alleged deprivation was a but-for cause of the alleged harm. "[A] person who fails to satisfy lawful, nondiscriminatory requirements or qualifications for the benefit lacks standing to raise claims of discrimination in the denial of the benefit." *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, 593-94 (10th Cir. 1996)(citing *Harris v. McRae*, 448 U.S. 297, 320, 100 S.Ct. 2671, 2689-90 (1980)); *Brunet v. City of Columbus*, 1 F.3d 390, 398-99 (6th Cir. 1993), *cert. denied*, 510 U.S. 1164, 114 S.Ct.

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[1]In response to *Price Waterhouse*, Congress amended Title VII of the Civil Rights Act of 1964 to allow for the limited recovery of declaratory and injunctive relief, and attorney fees and costs, when a plaintiff establishes that discrimination was a motivating factor and when the defendant establishes that it would have taken the same action. See 42 U.S.C.A. § 2000e-2(m); 42 U.S.C.A. § 2000e-5(g)(2)(B).

1190 (1994); *Donaghy v. City of Omaha*, 933 F.2d 1448, 1455 (8th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 938 (1992); *Bashir v. Supreme Court of Ohio*, 652 F.2d 641 (6th Cir. 1981); *Doherty v. Rutgers School of Law-Newark*, 651 F.2d 893, 899-902 (3rd Cir. 1981); and *Fulani v. Bentsen*, 35 F.3d 49, 54 (2nd Cir. 1994). *See also*, *Hopwood*, 78 F.3d at 956.

Lesage–an unqualified applicant who was eliminated from serious admissions consideration prior to the application of any diversity criteria–should not be able to establish liability and seek damages merely for having mailed an application.

3. Because Title VI Was Enacted Pursuant to the Spending Clause, Congress Lacked the Authority to Abrogate the States' Eleventh Amendment Immunity When it Enacted Title VI.

Lesage's claims for damages are predicated solely on Title VI, which this Court has already determined is a classic Spending Clause statute.[2] In light of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), it is plain that Congress lacks constitutional authority simply to *abrogate* the State's Eleventh Amendment immunity pursuant to Article I, whether through legislation enacted under the Commerce Clause or through legislation enacted under the Spending Clause. *Seminole Tribe*,

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[2] *See Guardians Ass'n v. Civil Serv. Comm.*, 463 U.S. 582, 599, 103 S.Ct. 3221 (1983), *cert denied.* 463 U.S. 1228, 103 S.Ct. 3568 (1983) (White, J., joined by Rehnquist, J.) (quoting Sen. Humphrey and other proponents of the Act); *accord Id.* at 636-38, 640 n.10 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting)(five Justices indicated that Title VI was enacted solely pursuant to the Spending Clause); *see also United Steelworkers v. Weber*, 443 U.S. 193, 206 n.6, 99 S.Ct. 2721, 2728 (1979) (Title VI enacted solely "to assure federal funds would not be used in an improper manner."). *See also Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 n.8, 112 S. Ct. 1028, 1038 n.8 (1992).

116 S.Ct. at 1126 (no "principled distinction" may be drawn between various Article I powers). The Spending Clause – even more plainly than the Commerce Clause and in contrast to the Fourteenth Amendment's § 5, which was "adopted well after the adoption of the Eleventh Amendment," *id.* at 1127 – is not "a grant of authority to the Federal Government at the expense of the States." *Id.* at 1126. *See Steward Mach. Co. v. Davis*, 301 U.S. 548, 597, 57 S.Ct. 883, 895 (1937)(the Spending Clause, while permitting States to contract "with Congress if the essence of their statehood is maintained without impairment," does not thereby reduce state authority, for "[e]ven sovereigns may contract without derogating from their sovereignty").

The court of appeals determined that 42 U.S.C. § 2000d-7 was the statute that "specifically concern[ed]" them, not the substantive provisions of Title VI. *Lesage*, 158 F.3d at 218. The court of appeals determined that § 2000d-7 was a "clear legislative statement" of congressional intent, a proposition that petitioner does not dispute. Clearly, § 2000d-7 was an omnibus remedial response to this Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142 (1985). But § 2000d-7, as applied to Title VI, does not satisfy the second element of *Seminole Tribe* – whether Congress has the constitutional authority to abrogate sovereign immunity.

Seminole Tribe has erected a meaningless requirement if, regardless of the contents of one or ten statutes, an umbrella waiver of the Eleventh Amendment is authorized *ex post facto* simply because one senator says, without any meaningful demonstration or analysis, that it is "clear" that they have the authority to do so. *See* App. A, 9 n.6. The only relevant issue, it would seem clear, is what authority Congress acted under when the underlying statutes were enacted.

The court of appeals found that because Title VI involved the prohibition of race discrimination by state actors, which "invokes the prohibition of the Equal Protection Clause[,]" and because the statute reflected congruence and proportionality in conformance

with *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997), it was enacted within Congress' authority under § 5. *Lesage*, 158 F.3d at 216-17. That holding cannot be squared with *Seminole Tribe* or the text or structure of Title VI.

Section one of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction* the equal protection of the laws.

(Emphasis added). Permissive legislation, such as Title VI, does not obviously evoke the Supremacy Clause or the power of the Fourteenth Amendment.[3] Petitioners do not dispute that prohibiting race discrimination is both laudatory and a legislative purpose supported by § 5. But Title VI does not prohibit race discrimination; it merely allows a recipient of federal money to agree to not discriminate. Promoting social policy by offering federal funding as a carrot is a different exercise of Congressional authority than the enforcement authority of § 5. A state actor could easily violate the Equal Protection Clause, but not Title VI, if it chose to forgo the funds. Thus, it cannot be true that Title VI

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[3]At least one district court that has addressed this analysis has determined that Title VI's non-comprehensive prohibition implies that it could not have been enacted under the Fourteenth Amendment. *Litman v. George Mason University,* 5 F.Supp.2d 366 (E.D. Va. 1998).

is sufficiently grounded in § 5 to justify abrogation of the States' Eleventh Amendment immunity.[4]

Petitioners are not arguing that the Fourteenth Amendment requires Congress to legislate remedies for all aspects of a social problem such as race discrimination. Congress does not have to require, for example, that all employers, regardless of number of employees, obey the provisions of Title VII. But that is a far cry from allowing ostensibly covered employers from opting out of Title VII prohibitions on race discrimination by forgoing some federal benefit. With the exception of the Spending Clause provisions enumerated in § 2000d-7, Petitioners cannot identify any Fourteenth Amendment anti-discrimination provision that gives the choice of enforcement, not to Congress, but instead to the state actor. If the Fourteenth Amendment does not permit "the den[ial] to any person within its jurisdiction the equal protection of the laws," then a provision that permits precisely that cannot have been enacted pursuant to the Fourteenth Amendment.

Petitioners respectfully request that this Court grant writ and find that Title VI was not enacted pursuant to § 5 of the Fourteenth Amendment.

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[4]Spending Clause enactments like Title VI are frequently contractual. "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1540 (1981). "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* Almost by definition, the University of Texas could not have known that a panel of the Fifth Circuit Court of Appeals would hold in March of 1996, for the first time in any published appellate court decision, that public university admissions decisions based in part on the diversity of the student body would violate Title VI and the Equal Protection Clause.

CONCLUSION

Petitioners respectfully request that this Court grant writ and reverse the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONERS

No. 97-50454

United States Court of Appeals,
Fifth Circuit

Appealed from the United States District Court
for the Western District of Texas

FRANCOIS DANIEL LESAGE

Plaintiff-Appellant,

v.

STATE OF TEXAS; UNIVERSITY OF TEXAS SYSTEM; BERNARD RAPOPORT; THOMAS O. HICKS; MARTHA SMILEY; LINNET DEILY; DONALD EVANS; ZAN HOLMES, JR.; LOWELL LEBERMANN; TOM LOEFFLER; ELLEN CLARKE TEMPLE; UNIVERSITY OF TEXAS AT AUSTIN; ROBERT BERDAHL; COLLEGE OF EDUCATION; MANUEL JUSTIZ, Dean of the College of Education, in his official capacity; FRANK WICKER, Director of Admissions, in his official capacity; WILLIAM CUNNINGHAM, Chancellor, Chancellor of the University of Texas System in his official capacity,

Defendants-Appellees.

Oct. 13, 1998

Before REAVLEY, DeMOSS and PARKER, Circuit Judges.
DeMOSS, Circuit Judge:

Francois Daniel Lesage applied to enroll in a doctoral program in counseling psychology at The University of Texas at Austin. Midway through the University's process of accepting applicants to that program, our Court handed down its opinion in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996).

Lesage, an African immigrant of Caucasian descent, was denied admission. He consequently sued the State of Texas, the University and several of its subdivisions, and various University officials in their official capacities. Lesage alleged that the University impermissibly relied on race as a selection criterion by giving preferred status to Black and Hispanic applicants. He claimed that the University's admissions policy violated the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §§ 1981, 1983, and 2000d. He sought monetary, declaratory, and injunctive relief.

The state asserted sovereign immunity for itself, its agencies, and its officials acting in their official capacity under the Eleventh Amendment, and at an early stage in the proceedings the district court dismissed Lesage's claims to the extent that he sought monetary relief under §§ 1981 and 1983. Lesage moved for partial summary judgment on the issue of the state's liability, and the state moved for summary judgment based on its theory that Lesage would have been denied admission regardless of the use of racial preferences in admissions. The district court granted the state's motion and dismissed the case.

Lesage appeals from the adverse judgment, and we reverse.

I.

The state asserts that Lesage's claims under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, are barred by the

Eleventh Amendment.[1] Pursuant to the United States Constitution, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Federal jurisdiction is thus negated with respect to covered suits, including federal suits against a state brought by the citizens of that state. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, _, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Eleventh Amendment immunity, if applicable, is shared by a state's agencies and officers to the extent that the state is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984); see *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, _, 117 S.Ct. 900, 903, 137 L.Ed.2d 55 (1997); *Earles v. State Bd. of*

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[1]The state has not filed a notice of appeal from the district court's ruling that the state was not immune from Lesage's Title VI claims. At first blush it might appear that to dismiss the case now on sovereign immunity grounds would violate the rule that an appellate court simply has no authority to grant the state relief that would expand its rights under the judgment. See FED. R.APP. P. 4(a) ("[I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from ...."); cf. *United States v. Coscarelli*, 149 F.3d 342, 343 (5th Cir.1998) (en banc). Nevertheless, "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct. 1347, 1363, 39 L.Ed.2d 662 (1974); see *Texas ex rel. Bd. of Regents of Univ. of Tex. Sys. v. Walker*, 142 F.3d 813, 819 n. 7 (5th Cir.1998), *petition for cert. filed*, 67 U.S.L.W. 3156 (U.S. Aug. 26, 1998) (Nos. 98-348 & 98-350). It would be anomalous for us to require the state to file a cross-appeal to preserve the immunity issue for appeal when the state had no obligation to raise the issue in the district court in the first place.

Cert. Pub. Acc'ts, 139 F.3d 1033, 1036 (5th Cir.1998), *petition for cert. filed*, 67 U.S.L.W. 3177 (U.S. Sept. 1, 1998) (No. 98-385).

The district court addressed the state's original claims of sovereign immunity with respect to the entire case and granted the state's motion to dismiss to the extent that Lesage sought monetary relief from the state pursuant to 42 U.S.C. §§ 1981 and 1983. The motion was otherwise denied. The entire case was later dismissed with prejudice pursuant to the court's entry of summary judgment in favor of the state.

Lesage may not bring his claims against the state in federal court unless the state has waived its immunity or Congress has abrogated it. Congress has conclusively resolved this issue against the state's claims of immunity by providing that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... title VI of the Civil Rights Act of 1964." 42 U.S.C. § 2000d-7(a)(1).

A.

The state contends that the abrogation of its Eleventh Amendment immunity under 42 U.S.C. § 2000d-7(a)(1) is invalid. "In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity'; and second, whether Congress has acted 'pursuant to a valid exercise of power.' " *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 1123, 134 L.Ed.2d 252 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)) (internal citation omitted, alterations in original). The first element of this inquiry--"a clear legislative statement," *Id.*, of congressional intent to abrogate the states' immunity--has plainly been satisfied by 42 U.S.C. § 2000d-7(a)(1).

The second element--federal legislative power to accomplish the abrogation--is also present. The Constitution forbids any state law that may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This provision has been construed to mean that in the distribution of benefits a state government cannot discriminate among citizens on the basis of race absent a compelling governmental interest in doing so, narrowly tailored to accomplish that need. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 109 S.Ct. 706, 721-22, 102 L.Ed.2d 854 (1989); *Dallas Fire Fighters Ass'n v. City of Dallas, Tex.*, 150 F.3d 438, 440-41 (5th Cir.1998); *Messer v. Meno*, 130 F.3d 130, 135-36 (5th Cir.1997), *petition for cert. filed*, 67 U.S.L.W. 3259 (U.S. Sept. 23, 1998) (No. 98- 535); *Hopwood*, 78 F.3d at 940.

Congress has "power to enforce" the substantive provisions of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. While this is a broad grant of power, it is not unlimited. See *City of Boerne v. Flores*, 521 U.S. 507, _, 117 S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1997) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 128, 91 S.Ct. 260, 266, 27 L.Ed.2d 272 (1970)). Congress only has the power to "enforce." This power is not a power to decree or change the substance of constitutional rights, because if it were Congress could no longer be said to be enforcing the provisions of the Fourteenth Amendment. See *Id.* at _, 117 S.Ct. at 2164. The Supreme Court thus recently announced a new standard for testing whether Congress has properly exercised Section Five power: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at _, 117 S.Ct. at 2164. This Court has paraphrased the command in Flores to involve consideration of "two primary facets: the extent of the threatened constitutional violations, and the scope of the steps provided in the legislation to remedy or prevent such violations." *Coolbaugh v. Louisiana ex rel. La. Dep't*

of Public Safety & Corr., 136 F.3d 430, 435 (5th Cir.1998), *cert. denied on other grounds*, 67 U.S.L.W. 3230 (U.S. Oct. 5, 1998) (No. 97-1941) (petition filed by Coolbaugh on ADA issues); see also *Scott v. University of Miss.*, 148 F.3d 493, 501-02 (5th Cir.1998).

In the case of Title VI, the constitutional concern is racial discrimination in federally funded public institutions. Racial discrimination by state actors invokes the prohibition of the Equal Protection Clause. See U.S. Const. amend. XIV, § 1. The legislation enacted by Congress to enforce that prohibition provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. This law prohibits precisely that which the Constitution prohibits in virtually all possible applications.[2] It can therefore hardly be argued that the statute does not reflect "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." That being the case, the original enactment of Title VI, as well as the subsequent explicit abrogation of state sovereign immunity to permit federal enforcement of Title VI, were within the congressional power to enforce the Fourteenth Amendment.

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[2]The text of the statute apparently does not account for a constitutionally permissible race-based distinction. Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 237, 115 S.Ct. at 2117 (citing *United States v. Paradise*, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987), as an example of a case in which a narrowly tailored race-based remedy survived scrutiny).

B.

The state suggests that Congress intended to invoke its powers under the Spending Clause rather than the Fourteenth Amendment when it enacted Title VI. Assuming arguendo the validity of that proposition concerning the subjective intent of certain legislators, it is entirely irrelevant to our inquiry. In evaluating the constitutionality of a statute, we simply ask if Congress sufficiently articulated an abrogation of state sovereign immunity and if it had the power to do so. See *Seminole Tribe*, 517 U.S. at 55, 116 S.Ct. at 1123. This is an entirely objective inquiry, for " '[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.' " *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 1064 n. 18, 75 L.Ed.2d 18 (1983) (quoting *Woods v. Miller*, 333 U.S. 138, 144, 68 S.Ct. 421, 424, 92 L.Ed. 596 (1948)) (alteration in original); see also *Ussery v. Louisiana ex rel. La. Dep't of Health & Hosps.*, 150 F.3d 431, 436 n. 2 (5th Cir.1998) ("Given the objective nature of our judicial review, the State's cursory argument that the statutory text and legislative history of the 1974 Amendments to the EPA support a finding that Congress was acting pursuant to the interstate commerce clause when it made those amendments is immaterial."); *Wheeling & Lake Erie Ry. Co. v. Public Util. Comm'n*, 141 F.3d 88, 92 (3d Cir.1998) ("[W]hen determining the sources of Congress's authority to legislate, we may look beyond the expressed constitutional basis in a statute's preamble or legislative history."); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir.1997); *Bryant v. New Jersey Dep't of Transp.*, 1 F.Supp.2d 426, 432-35 (D.N.J.1998).

Moreover, it is the statute abrogating immunity, not the particular substantive provision of the statute, which specifically concerns us. See *Ussery*, 150 F.3d at 436 n. 2; *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838 n. 7 (6th Cir.1997). Congress unquestionably enacted 42 U.S.C. § 2000d-7 with the "intent" to invoke the Fourteenth Amendment's

congressional enforcement power. The purpose of the provision, enacted in 1986, was to legislatively overrule the result in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). In *Atascadero*, the Court held that Section 504 of the Rehabilitation Act of 1973,[3]] which prohibited states from discriminating against the disabled in the administration of federally funded programs, did not contain a sufficiently specific statement of abrogation of Eleventh Amendment immunity to permit suits against states in federal court. See *Atascadero*, 473 U.S. at 245-46, 105 S.Ct. at 3149. Congress instantly recognized the far-reaching implications of this ruling and enacted, as part of the Rehabilitation Act Amendments of 1986,[4] legislation to reverse the result in Atascadero and to prevent the application of the reasoning in *Atascadero* to preclude the filing of suits in federal court against states under similar statutes.[5] The Congressional Record contains specific references to exercising congressional power under Section Five of the Fourteenth Amendment to accomplish this abrogation of Eleventh

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[3]Pub.L. No. 93-112, § 504, 87 Stat. 355, 394 (codified as amended at 29 U.S.C. § 794).

[4]Pub.L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (codified at 42 U.S.C. § 2000d-7).

[5]The coverage of the abrogation of Eleventh Amendment immunity includes:

> Title IX of the Education Amendments of 1972 [20 U.S.C. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7.

Amendment immunity.[6] The state's argument thus rests on

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[6]Senator Cranston, self-proclaimed author of § 504 of the Rehabilitation Act and the post-*Atascadero* legislation to abrogate the states' Eleventh Amendment immunity from suit under that provision, spoke on the floor of the Senate concerning the provision that would ultimately be enacted and codified as 42 U.S.C. § 2000d-7. By unanimous consent, an official report on the legislation, written by the Justice Department and relied upon by Senator Cranston, was entered into the report at Senator Cranston's request. With respect to congressional authority for the proposed abrogation of Eleventh Amendment immunity, the letter opined that such an action could be taken pursuant to powers under both the Spending Clause and the enforcement clause (§ 5) of the Fourteenth Amendment. With reference to use of the enforcement power, the letter noted:

> The [*Atascadero*] Court stated that Congress may provide for suits against the States to enforce the fourteenth amendment . . .
>
> * * *
>
> . . . *Atascadero* provides the blueprint for Congressional action to waive the eleventh amendment's ban to suit in Federal court under the fourteenth amendment . . . . Thus, to the extent that the proposed amendment is grounded on congressional powers under section five of the fourteenth amendment, S. 1579 makes Congress' intention "unmistakably clear in the language of the statute" to subject States to the jurisdiction of Federal courts.

132 CONG. REC. S15100 (daily ed. Oct. 3, 1986) (Letter from John R. Bolton, Assistant Attorney General, U.S. Department of Justice, Office of Legislative and Intergovernmental Affairs, to Hon. Orrin Hatch, Chairman, Committee on Labor and Human Resources, U.S. Senate (July 13, 1986) (citing *Atascadero*, 473 U.S. at 242, 105 S.Ct. at 3147, and *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976))).

presumptions regarding subjective intent which are simply incorrect with respect to the relevant statute.

We thus conclude that the district court correctly ruled when it declined to dismiss Lesage's claims under 42 U.S.C. § 2000d on Eleventh Amendment grounds.

II.

In his motion for partial summary judgment, Lesage relied entirely upon the state's admission that its pre-*Hopwood* admissions process "involved explicit assessments of many candidate attributes, including race." The state responded in its own motion for summary judgment and in its reply to Lesage's motion that race had nothing to do with the decision to exclude Lesage from the counseling psychology program. The state's main two contentions were that Lesage was eliminated from consideration before race was taken into account, and that Lesage would not have been offered admission even if racial preferences had not been employed.

We review a summary judgment de novo. See, *e.g.*, *FDIC v. Shaid*, 142 F.3d 260, 261 (5th Cir.1998) (per curiam). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The movant is obligated to explain the basis for its motion, identifying evidence in the record which demonstrates the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). In order to defeat summary judgment, the nonmovant must produce affidavits or other evidence establishing specific facts that show that there is a genuine issue for trial. See FED. R. CIV. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct.

1348, 1356, 89 L.Ed.2d 538 (1986). Drawing all reasonable inferences in favor of the nonmovant, we conduct the same inquiry as would the district court. See, *e.g.*, *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

A.

The state presented evidence to clarify the admissions procedure for the counseling psychology program in order to support its contention that, although race had been considered during the admissions process, Lesage had been eliminated as a candidate prior to the use of racial preferences. An affidavit by Dr. Frank Richardson, an associate professor of counseling psychology and the chairman of the University's counseling psychology admissions committee, was attached to the state's response. In it, Dr. Richardson explained the admissions procedure, as it was conducted for the class entering in the fall of 1996. Approximately 223 applications were received in January and February 1996. The first cut, when Lesage's application was eliminated, narrowed the field to forty qualified applicants, from which approximately fifteen to eighteen applicants would be offered admission. Applicants who did not meet the minimum standards for grade point average or Graduate Record Exam (GRE) score were eliminated at this stage. Marginal candidates whose relatively poor academic record or test scores were not counterbalanced by other factors such as the personal statement, difficulty of undergraduate curriculum, strength of recommendations, or extenuating circumstances, were also eliminated. The affidavit conceded that in choosing students from the resulting pool of forty candidates, the committee did consider "the Program's pedagogical need for a diverse entering class," which, to the committee, meant that it would "consider factors such as gender, age, race, and ethnicity in making [a] final decision as to the most desirable composition of the class." Based

on this evidence, the state asserted, in its response to Lesage's motion for partial summary judgment, that:

> Whatever consideration is given race and ethnicity in deciding on the ultimate makeup of a counseling psychology class, it played no role in the review of Lesage's application. His application was rejected early on, when the committee was reviewing the large pool and narrowing it down to approximately 40 applicants. Contrary to the two-track system analyzed in *Hopwood*, Lesage's application was "in the mix" with the rest, and was not even remotely competitive. Only later on did the committee add student "diversity" as a decision-making criterion.

In reply, Lesage provided the district court with evidence that race also had been taken into account before the "first cut" to forty students was determined. The evidence was taken from Dr. Richardson's deposition testimony regarding the initial reduction of the applicant pool to forty candidates. Dr. Richardson testified that:

> [T]here are a couple of other things that are involved . . . We're interested in diverse cultures and ethnic backgrounds . . . Obviously, we're interested in qualified people of Hispanic and African American background. Everyone in psychology and counseling psychology is very sensitive to those issues and very concerned to get qualified minority students.[7]

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[7]The quoted passage in the text, taken from Lesage's response to the state's reply to his motion for partial summary judgment, is a heavily edited condensation of Dr. Richardson's testimony. The actual, unedited exchange, reads as follows:

> Q. [counsel for Lesage] Well, let's talk about--And this is just real basic--basic criteria you use, and let's just kind of start with this paring down process from 220 to 40. What criteria in the folder do you rely on most?
>
> A. [Dr. Richardson] From the 40 to the 20 or the 200 to the 40.

(continued...)

[7](...continued)

Q. From the 220 to the 40 when you're making the initial cut. I mean, obviously G.R.E.

A. Well, let me see if I can summarize it intelligently. From the 220 or so to the 40, there are a great many folders that even though we try to look at them thoughtfully for a bit, they're clearly just completely out of the consideration, I mean, with very low G.R.E.s or very low grade point average or very sloppily done or something but typically G.R.E. and grades. So there is a great many of them. It's easy to weed out.

But you know, beyond that there is 100 or so, I guess, that require some thoughtful consideration. And I really don't know exactly how many. You know, there is a set of conventional criteria, G.R.E.s, grades, letters of recommendation, educational background that might include the quality of the school or major. And personal statement is an important, very important piece of the puzzle. So there is a set of conventional criteria like that we use, and people have to be fairly high on most of them, you know, strong on all but one or two and decent on those.

Q. To move up?

A. To move up. There is another consideration, and we try to evaluate by looking at letters on statements and background. This is written in our literature. And we want people who give evidence of interest in and aptitude for and personal qualities for counseling and psychotherapy work for professional psychology work. Now, that is a necessary condition but not a sufficient one.

We're also interested in people who come across pretty strongly in that regard who have shown some spark of--some potential for creative, professional or intellectual work of a special kind. And that includes being interested in people who want to do things other than just be counselors and psychotherapists, who are interested in public service, public policy, what is sometimes called community psychology work, or who have research or theory interests of a special kind, professional or academic creativity and what is the word, originality, those two things. So we look for that as well as the basic criteria.

Q. Now, have you jumped ahead from cutting from the 220 to the 40 to

(continued...)

Despite this evidence, the district court granted the state's summary judgment motion, stating: "[T]he Court finds no evidence that race was a factor in the decision to deny Plaintiff's admission to the counseling psychology program. That is, the Court finds that Plaintiff cannot present a prima facie case of disparate treatment or disparate impact discrimination." In light of the state of the record and this Court's ruling in *Hopwood*, the district court erred by disposing of Lesage's claims in this fashion.

Just as in *Hopwood*, Lesage's central claim is that he was subjected to unconstitutional racial discrimination by the

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[7](...continued)
talking more about how--
A. No.
Q. That is how--
A. I keep expecting you to ask me some more things. But, you know, there are a couple of other things that are involved. We're very interested in people with diverse interests, backgrounds. We're interested in diverse cultures and ethnic backgrounds. We're interested in diverse life experiences. We're interested in getting both males and females in the program.
I could lump all of those under the category, I guess, of diversity. We're keenly interested in getting a diverse student body. Occasionally, a capable handicapped person will apply. There was one in recent years.
We have a handful of applications of people from other countries. That is often very interesting, even Russia or China. They usually look like very interesting people, but there are reasons why they probably wouldn't make it in a graduate school of this type, but that is not always the case. We've accepted a couple of students in the last couple of years or two from Iceland, which has an interesting program of preparing people very well for graduate studies overseas.
Obviously, we're interested in qualified people of Hispanic and African American background. Everyone in psychology and counseling psychology is very sensitive to those issues and very concerned to get qualified minority students.

University's evaluation of his admissions application. See *Hopwood*, 78 F.3d at 938. Dr. Richardson's deposition testimony created a fact issue as to whether race was considered by the admissions committee during the first screening phase, while Lesage's application was still being considered. If race was considered before Lesage's application was rejected, Lesage has standing to challenge the admissions policy because his application may have been affected by the use of racial preferences. In that scenario, the University's consideration of race as an admissions criterion must be subjected to strict scrutiny analysis. See, *e.g.*, *Adarand*, 515 U.S. at 227, 115 S.Ct. at 2113 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *Croson*, 488 U.S. at 493-94, 109 S.Ct. at 721-22; *Dallas Fire Fighters*, 150 F.3d at 440-41; *Messer*, 130 F.3d at 135-36; *Hopwood*, 78 F.3d at 938, 940. "Diversity," the justification given for the University's use of racial preferences, is not a compelling state interest that satisfies the strict scrutiny standard for the purpose of admissions at a public university. See *Hopwood*, 78 F.3d at 944 ("[A]ny consideration of race or ethnicity ... for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."); cf. *Lutheran Church--Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C.Cir.1998) ("We do not think diversity can be elevated to the 'compelling' level [in the context of the FCC's equal employment opportunity regulations], particularly when the Court has given every indication of wanting to cut back *Metro Broadcasting* [*Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990)]."), *petition for reh'g denied*, 154 F.3d 487 (D.C.Cir.1998), *petition for reh'g en banc denied*, 154 F.3d 494 (D.C.Cir.1998); *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir.1996) (*en banc*) (declining to endorse diversity as an appropriate justification for affirmative action programs in the employment context pursuant to Title VII), *cert. dismissed*, _ U.S. _, 118 S.Ct. 595, 139 L.Ed.2d 431 (1997).

Of course, when reviewing a summary judgment, a court must draw all reasonable inferences in favor of the nonmovant. See, e.g., *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513. Dr. Richardson admitted in his deposition that race was used as a factor during the winnowing down of the pool of applications "from the 220 to the 40"--a stage at which Lesage was indisputably still "in the mix." At oral argument, we asked counsel for the state to identify evidence in the record that might prove, despite Dr. Richardson's recollection at his deposition, that Lesage's application was eliminated from consideration before any other applicant benefitted from the admissions committee's racial preferences. Counsel provided no such example; neither has our review of the record discovered any such evidence. It logically follows that the district court erred by resolving a factual dispute at the summary- judgment stage and declaring that there was "no evidence that race was a factor in the decision to deny Plaintiff's admission to the counseling psychology program."[8] Under these circumstances, given the genuine, material factual dispute as to when the University first used race as a criterion to choose or exclude candidates to the counseling psychology program in relation to the point in time at which Lesage was denied

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[8]While we need not consider any evidence other than Dr. Richardson's deposition testimony in order to conclude that the district court erred by granting summary judgment, we note for the sake of completeness that the record contains further evidence to support Lesage's allegation of race- based discrimination. Significantly, some Black and Hispanic candidates were extended offers of admission and admitted to the program, even before the first cut was even made. Lesage did not bring this specific evidence to the attention of the district court until he filed his motion for reconsideration of the court's grant of summary judgment. Because Dr. Richardson's deposition testimony, standing alone, is sufficient to create a factual issue that precluded summary judgment, we decline to address whether the district court abused its discretion by refusing to reconsider the entry of summary judgment in light of this additional evidence.

admission, it was error to grant summary judgment in favor of the state.

B.

The State of Texas contends that despite its use of racial preferences in the admissions process for the University's counseling psychology program, it is nevertheless entitled to summary judgment because Lesage would not have been admitted to the program even if race had not been taken into consideration. This reasoning was supported by affidavits by Dr. Richardson and Dr. Ricardo Ainslie, both of whom served on the admissions committee for the counseling psychology program. Because no records relating to the admissions committee's evaluations at this stage were retained, the opinions expressed in these affidavits were based on a fresh, post-admissions review of the application pool, undertaken for the purposes of this litigation. These affidavits evaluated and criticized Lesage's application. Dr. Ainslie also compared Lesage's application to twenty-two "much stronger" applications, all of which, according to Dr. Ainslie, would have earned offers of admission before Lesage. The district court adopted this reasoning as an alternative holding supporting its decision to grant summary judgment in favor of the state. This argument, however, is simply irrelevant to the pertinent issue on summary judgment, namely, whether the state violated Lesage's constitutional rights by rejecting his application in the course of operating a racially discriminatory admissions program.

In *Hopwood*, even though the district court determined the state had proved that "legitimate, nondiscriminatory grounds exist[ed] for the law school's denial of admission to each of the four plaintiffs and that, in all likelihood, the plaintiffs would not have been offered admission even under a constitutionally permissible process," this did not result in an outright grant of summary judgment for the state. *Hopwood v. Texas*, 861 F.Supp. 551, 581 (W.D.Tex.1994), rev'd on other grounds, 78 F.3d 932

(5th Cir.), *cert. denied*, 518 U.S. 1033, 116 S.Ct. 2580, 135 L.Ed.2d 1094 (1996). The district court first determined liability and then turned to the competitiveness of the plaintiffs' applications on the question of damages. This was the proper ordering of matters before the court. The possibility that the *Hopwood* plaintiffs, or Lesage, would not have been offered admission is relevant only to the quantum of damages available--not to the pure question of the state's liability, which is the issue on summary judgment.

Assuming, as we must, that the state did indeed employ a racially discriminatory counseling psychology admissions program as alleged, those applicants who had not yet been eliminated from consideration at the time racially preferential criteria were applied have suffered an implied injury-- even if their applications ultimately would not have resulted in admission under a nondiscriminatory admissions regime. See *Hopwood*, 78 F.3d at 957. "The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.' " *Adarand*, 515 U.S. at 211, 115 S.Ct. at 2105 (internal citation omitted). Thus, even though the district court may have correctly predicted that Lesage suffered no direct injury and therefore incurred no compensatory damages, this scenario does not foreclose the availability of some other relief to which he may be entitled. The futility of Lesage's application was, therefore, an improper grounds for summary judgment.

III.

For the foregoing reasons, we REVERSE the judgment of the district court. Because Lesage does not appeal from the denial of his motion for partial summary judgment, we REMAND for further proceedings.

REAVLEY, Circuit Judge, specially concurring:

This court's writing in *Hopwood*, upon which the instant judgment is reversed, was inconsistent with the judgment of the *Supreme Court in Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) and was unnecessary to the holding or judgment of the *Hopwood* court. This circuit court, however, considers that *Hopwood* writing to be binding law. I concur here in the judgment only.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCOIS DANIEL LESAGE	§	
	§	
v.	§	C.A. No. A-96-CA-386 JN
	§	
STATE OF TEXAS, et al.	§	

ORDER

Before the Court are Plaintiff's Motion for Summary Judgment filed on December 23, 1996 (Clerk's Doc. No. 41) and Defendants' Motion for Summary Judgment filed on January 6, 1997 (Clerk's Doc. No. 46). Defendants filed their Response to Plaintiff's Motion for Partial Summary Judgment on January 10th. Plaintiff filed his Reply to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment and Response to Defendants' Motion for Summary Judgment on January 15th. Defendants filed a Reply to Plaintiff's Response on January 28th. Finally, the United States filed its *Amicus Curiae* Brief in support of Defendant University of Texas on January 13th (Clerk's Doc. No. 53). Upon review of the Parties' motions, the responsive materials filed, the applicable legal authorities and the entire case file, the Court enters the following Order.

Brief Background

Plaintiff Francois Daniel Lesage is an unsuccessful applicant to the UT College of Education's counseling psychology doctoral program for the fall of 1996. Plaintiff is a white male. This lawsuit was filed in the wake of the Fifth Circuit's *Hopwood* decision. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. Denied*, 116 S.Ct. 2581 (1996). Essentially, Plaintiff claims that he was denied admission to the program because the admissions committee made an impermissible use of race in

admission to its graduate program. Thus, Plaintiff claims that the Defendants have violated his Fourteenth Amendment Equal Protection rights.

Plaintiff has named as Defendants the University of Texas System; the regents of the UT System; the chancellor of the UT System; UT at Austin; the president of UT at Austin; and the College of Education and its dean and director of admissions. All individuals are being sued in their official capacities only. Defendants respond that race was not a motivating factor in their decision to deny Plaintiff admission to the program and that irrespective of any alleged use of race in the decision-making process, Plaintiff would not have been admitted.

Summary Judgment Standard

A party moving for summary judgment has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The party moving for summary judgment bears the initial burden of showing the basis for the motion and of identifying the pleadings and evidence which it believes demonstrates the absence of a genuine issue of material fact. *Washington v. Armstrong World Industry, Inc.*, 839 F.2d 1121 (5th Cir. 1988). Once a summary judgment motion is made and properly supported, the non-movant must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Pleadings are not summary judgment evidence. *Id.; Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

Analysis

Plaintiff claims that the decision to deny his application to the graduate program in counseling psychology was the result of

discrimination based on race in violation of the Equal Protection Clause of the Fourteenth Amendment, 42 U.S.C. § 1983, 42 U.S.C. § 1981, and Title VI of the 1964 Civil Rights Act (codified as 42 U.S.C. § 2000d, *et seq.*). The statutory violations are derivative of the Equal Protection Allegations. Specifically, Plaintiff contends in his complaint that "Defendants have established and are maintaining, under color of the laws of the State of Texas, an affirmative action admissions program at the College of Education that classifies applicants on the basis of race and ethnicity and denies academically qualified white and non-preferred minority applicants the equal protection of the laws."

The admissions procedure utilized for the counseling psychology program at UT is very different from the process utilized by UT's law school in the *Hopwood* case.[1] Approximately 223 individuals applied for admission to the counseling psychology program for the fall 1996 term. The admissions committee consisted of two counseling psychology professors, Frank Richardson and Ricardo Ainslie. At the initial state, Drs. Richardson and Ainslie screened the applicant files in order to select approximately 40 of the strongest candidates from which to make approximately 15 to 18 offers of admission.

At the first step, the admissions committee eliminated any applicant that did not meet minimum graduate school requirements of a minimum grade point average ("GPA") of 3.0 and a score of 1000 on the Graduate Record Exam ("GRE"). The committee also included other applicants in this first round of cuts in order to reduce the applicant pool from 223 to approximately 40. At this stage, the committee considered factors such as GPA, GRE scores,

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[1]At the outset, the Court notes that there is no written description of the admissions process to the counseling psychology program. That is, the admissions process for the program is on a much smaller scale and much more informal than the process involved at UT's law school, which was the subject of the *Hopwood* decision.

letters of recommendation and the applicants' personal statements of their experiences, goals, and interest in the counseling psychology program. It was at this state that the Defendants claim Plaintiff's application was eliminated from the applicant pool.

Plaintiff's GPA, as reported by the graduate school, was 3.66 and his GRE was 1030.[2] The average undergraduate GPA of students offered admission was 3.56 and the average GRE score was 1,252. At least 80 applicants had a higher GPA than Plaintiff, 152 applicants had a higher GRE score and 73 applicants had both a higher GPA and GRE than Plaintiff. In fact, Plaintiff's GRE score was significantly lower than the 1177 average of the entire applicant pool and only one student ultimately admitted to the program had a lower GRE score than Plaintiff. That one student was white and was from Iceland - and that student spoke English as a second language. Thus, Defendants claim that Plaintiff's academic scores were not exceptional.

The Defendants also argue that Plaintiff's personal statement indicated his inappropriateness for the counseling psychology program. The summary judgment evidence shows that Plaintiff's personal statement and his letters of recommendation were extensively considered by the admissions committee. For instance, Professor Ainslie testified that:

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[2]The graduate school initially processes all the applications by verifying transcripts and reporting grade averages and test scores on a standardized form. The graduate school then submits the forms with the applicant's information to the various graduate admissions committees. In this case, Plaintiff's application indicated that his GPA was 3.9, but the information verified by the graduate school provided that Plaintiff's GPA was 3.6. Defendants argue that the counseling psychology admissions committee uses the graduate school's calculations of GPA and RE in their process, and does not consider such information informally supplied by the applicant on his application. Plaintiff offers no evidence that the admissions committee did not use the information as verified by the graduate school.

> Mr. Lesage's personal statement [was] quite limited and underdeveloped. There is a brief (one-liner) statement about work that is POTENTIALLY counseling related, with no description of his activities or how they might have contributed to his interest in counseling (if they did) . . . More generally, Mr. Lesage's statement is poorly written. He does not write well and he mis-spells, and, more significantly, misuses words . . . His ideas are very poorly developed throughout the essay. One is not left with the impression of a bright, thoughtful scholar, but rather that of a person with a rather superficial interest in the field with a limited capacity to convey his interests and ideas. There is very little here to suggest that he is a good fit with the program.

Professor Ainslie also testified that Plaintiff's three letters of recommendation were weak and that none of the letters indicated that Plaintiff would be a good candidate for a program in counseling psychology.

Upon completion of the review of Plaintiff's application, the committee determined that Plaintiff was not suitable for counseling psychology and that Plaintiff was not even particularly interested in counseling psychology. Thus, Plaintiff's application was denied early in the review process. Defendants maintain that Plaintiff's application was at no time tracked separately from minority applicants and that his denial was based upon deficiencies in his application, and was not motivated by race.[3]

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[3]Defendants included a list of at least 36 students who were not admitted to the counseling psychology program whose GPAs and GREs were higher than the Plaintiff's and whose personal statements the admissions committee field were superior to the Plaintiff's. That is, Defendants have submitted evidence that these rejected students - 24 of whom were white - would have been offered admission ahead of the Plaintiff.

Once the applicant pool was narrowed down to the top 40 applicants, the Defendants did consider race and other personal characteristics as part of the process to select the 15 to 18 applicants which would be offered admission to the program. Dr. Richardson testified that, when determining which of the 40 applicants will receive offers of admissions, the committee considered such factors as "the Program's pedagogical need for a diverse entering class and [considered] factors such as gender, age, race, and ethnicity in making our final decision as to the most desirable composition of the class." Defendants maintain that the counseling psychology department has a strong academic justification for having some diversity in the student body. Defendants argue that counseling "focuses on therapeutic interpersonal communication, and the program needs gender, age, race, and ethnic diversity to enhance the training of these communication skills." Again, even the students who made the final 40 were never separated into a minority group and a non-minority group and considered separately under different standards.

Plaintiff, in response, does not contest the admissions committee's evaluation of the deficiencies of his application (other than the discrepancy in the reported GPA discussed above). Plaintiff also fails to address the higher evaluations given to the students ultimately offered admission to the program. Plaintiff does not offer any evidence of disparate treatment among the minority and non-minority applicants in the application process other than Defendants' own admission that race was one factor, among many, the committee took into consideration after the field of applicants had been reduced to approximately 40. Plaintiff does attempt to create some fact issue by arguing that it's unclear whether his application was eliminated early in the process. Plaintiff argues that no document exists that indicates which applicant survived when the pool was reduced to 40. Plaintiff, however, submits no evidence that indicates that he was included in the final mix of students considered by the committee. Rather,

the evidence is very strong that Plaintiff's application was poor and that he, and 180 other applicants, were rejected early in the process.

Plaintiff also argues, in his summary judgment motion, that Defendants admit in a document filed with the Court that race was a consideration in application decisions. The document Plaintiff refers to relates to a request for an extension to the Court's scheduling order. Defendants stated in that document that the admissions process "involved explicit assessments of many candidate attributes, including race" and that the Plaintiff had "almost no burden." The Court does not find this document, prepared by Defendants' counsel, to be an admission that Plaintiff's race was a consideration in their decision to deny his admittance. In fact, this is practically the only evidence submitted by Plaintiff to support his position and the sole basis for his four-page summary judgment motion. Plaintiff's argument here is without merit.[4]

Accordingly, the Court finds no evidence that race was a factor in the decision to deny Plaintiff's admission to the counseling psychology program. That is, the Court finds that Plaintiff cannot present a *prima facie* case of disparate treatment or disparate impact discrimination. Even if Plaintiff had met his *prima facie* burdens, the Court finds that Defendants have provided a legitimate and non-discriminatory explanation for its decision to deny Plaintiff's application. There is uncontested evidence that the students ultimately admitted to the program have credentials

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[4]The Court notes that Plaintiff has submitted practically no summary judgment evidence to support its own motion for summary judgment or to controvert the Defendants' very well supported summary judgment motion. The only exhibit attached to Plaintiff's response to Defendants' motion is a copy of an article from UT's student newspaper. Plaintiff later filed a limited excerpt from the deposition of Frank Richardson. No supporting evidence is attached to Plaintiff's motion for partial summary judgment.

that the committee considered superior to Plaintiff's credentials. That is, the Court finds from the summary judgment evidence presented that race did not effect the admissions committee's decision regarding the Plaintiff. Plaintiff's conclusory allegations of discrimination have no probative force and are insufficient to defeat summary judgment. *Ray v. Tandem Computers, Inc.*, 53 F.3d 429, 435 (5th Cir. 1995).

The Court will not address whether the committee's later use of race as a factor in narrowing the field of 40 to those offered admission is constitutionally permissible. Even if the Court assumes *arguendo* that the Defendants intended to discriminate or otherwise act unconstitutionally, the Defendants are able to show that their action would have occurred regardless of that intent. *See Hopwood v. State of Texas*, 78 F.3d 931, 956 (5th Cir. 1996)(concluding that the *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 284 (1977), methodology is appropriate in racial preference cases). As addressed above, the Defendants have submitted voluminous evidence supporting its position that race had no effect on its decision to deny Plaintiff's admittance to the program. Plaintiff has produced no evidence to rebut Defendants' proffered evidence and explanation. Thus, because Defendants have demonstrated that any consideration of race had no effect on this particular individual's rejection, the Court will not address the constitutional question of whether the Defendants' use of race in its admissions process is constitutional in light of the *Hopwood* decision.

Finally, Plaintiff has made a claim against the Defendants' Graduate Opportunity Fellowship Program that was in effect when he applied to the counseling psychology program. The "GOP" scholarships were available to students with "consideration given to ethnic and economic factors." In order to be considered for this scholarship, the student had to be admitted to the graduate program – that is, the scholarships were not available to those who were not admitted to the counseling psychology program. Because

Plaintiff was never admitted to the program, he was not denied the opportunity to apply for the scholarship. Plaintiff offers no evidence or argument to controvert Defendants' assertions. Furthermore, the program was suspended in the wake of the *Hopwood* decision.

Accordingly, the Court finds that Defendants are entitled to summary judgment on Plaintiff's Equal Protection claims. Plaintiff's statutory claims under 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VI are based on the Fourteenth Amendment's Equal Protection guarantees. Thus, the Court's finding that Plaintiff has presented no evidence of discriminatory intent or pretext is dispositive of the statutory claims. Accordingly, the Court will grant Defendants' summary judgment motion, deny Plaintiff's partial summary judgment motion, and dismiss all Plaintiff's claims against the Defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT Plaintiff'S Motion for Partial Summary Judgment is hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT Defendants' Motion for Summary Judgment is hereby GRANTED and that all Plaintiff's Claims against Defendants are DISMISSED WITH PREJUDICE.

FINALLY, IT IS ORDERED that this cause is CLOSED and that any pending motions are hereby DISMISSED AS MOOT.

SIGNED AND ENTERED this 7th day of March, 1997

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCOIS DANIEL LESAGE	§	
	§	
v.	§	C.A. No. A-96-CA-386 JN
	§	
STATE OF TEXAS, et al.	§	

FINAL JUDGMENT

Before the Court is the above-entitled cause of action. In light of the Court's Order granting Defendants' Motion for Summary Judgment, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED, ADJUDGED AND DECREED that all Plaintiff's claims against Defendants are DISMISSED WITH PREJUDICE.

SIGNED AND ENTERED THIS 7th day of March, 1997

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
APR 14 1999
CLERK

No. 98-1111

In the Supreme Court of the United States

OCTOBER TERM, 1998

STATE OF TEXAS, ET AL., PETITIONERS

v.

FRANCOIS DANIEL LESAGE

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States intervened in this litigation, pursuant to 28 U.S.C. 2403(a), solely for the purpose of defending the constitutionality of the abrogation of Eleventh Amendment immunity contained in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Accordingly, the United States addresses only the following question:

Whether Congress's abrogation of the States' Eleventh Amendment immunity in Title VI of the Civil Rights Act of 1964 is constitutional.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Atascadero State Hosp. v. *Scanlon*, 473 U.S. 234 (1985)	2, 9, 10
Bell v. *New Jersey*, 461 U.S. 773 (1983)	10
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	7
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989)	7, 8
Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 118 S. Ct. 2340 (1998)	6, 10
Crawford v. *Davis*, 109 F.3d 1281 (8th Cir. 1997)	6
Doe v. *University of Ill.*, 138 F.3d 653 (7th Cir. 1998), petition for cert. pending, No. 98-126	6, 9
EEOC v. *Wyoming*, 460 U.S. 226 (1983)	7
Edelman v. *Jordan*, 415 U.S. 651 (1974)	10
Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976)	6, 8
Franks v. *Kentucky Sch. for the Deaf*, 142 F.3d 360 (6th Cir. 1998)	6
Fullilove v. *Klutznick*, 448 U.S. 448 (1980)	7, 8, 9
Gebser v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989 (1998)	5
Green v. *Mansour*, 474 U.S. 64 (1985)	5
Lane v. *Peña*, 518 U.S. 187 (1996)	2, 5, 10
National Mut. Ins. Co. v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949)	9
New York v. *United States*, 505 U.S. 144 (1992)	10
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996)	5, 6

Cases—Continued: Page

South Dakota v. *Dole*, 483 U.S. 203 (1987) 9
Texas v. *Hopwood*, No. 95-1773, cert. denied, 518 U.S. 1033 (1996) 5
Woods v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948) 7

Constitution and statutes:

U.S. Const.:
Art. I, § 8:
Cl. 1 (Spending Clause) 7, 9
Cl. 3 (Commerce Clause) 8
Amend. XI 3, 4, 6, 9
Amend. XIV 8, 9
§ 5 ..... 3, 4, 6, 7, 8
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.*:
42 U.S.C. 2000d 2
42 U.S.C. 2000d-7 ..... 4, 5, 6, 8, 9, 10
42 U.S.C. 2000d-7(a)(1) 2
42 U.S.C. 2000d-7(b) 3
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* 6
Public Works Employment Act of 1977, 42 U.S.C. 6701 *et seq.* 7-8
Rehabilitation Act of 1973, § 504, 29 U.S.C. 794 ..... 2, 6
Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 2
28 U.S.C. 2403(a) 3
42 U.S.C. 1981 3
42 U.S.C. 1983 3

In the Supreme Court of the United States

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STATE OF TEXAS, ET AL., PETITIONERS

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FRANCOIS DANIEL LESAGE

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 158 F.3d 213. The opinions of the district court denying petitioners' motion to dismiss (Dist. Ct. Rec. 106-110)[1] and granting petitioners'

[1] Petitioners did not reproduce in the petition appendix the district court's ruling on the motion to dismiss. The district court docket sheet indicates, however, that it may be found on the designated pages of the district court record, which was before the court of appeals. In addition, we have lodged a copy of the district court's decision with the Clerk of the Court.

motion for summary judgment (Pet. App. A20-A28) are unreported.

JURISDICTION

The court of appeals entered its judgment on October 13, 1998. The petition for a writ of certiorari was filed on January 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States" shall "be subjected to discrimination" on the grounds of race, color, or national origin "under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. Congress further directed that:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of * * * title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. 2000d-7(a)(1). Congress added this abrogation language to Title VI in 1986, following this Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), which held that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 246 (addressing Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794); see also Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845; *Lane* v. *Peña*, 518 U.S. 187, 198 (1996) (chronicling the amendment history). The effective date of the abrogation provision was October 21, 1986. 42 U.S.C. 2000d-7(b).

2. Respondent Francois Daniel Lesage, a white male, filed suit against petitioners the State of Texas, the University of Texas, and various university officials under 42 U.S.C. 1981, 1983, and Title VI. Pet. App. A2. Respondent alleged that he was denied admission to the University's doctoral program in counseling psychology because of the University's consideration of race as one factor in admission decisions. *Id.* at A2, A22.

Petitioners moved to dismiss the Title VI claim on the ground of Eleventh Amendment immunity. Pet. App. A2. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the abrogation of Eleventh Amendment immunity in Title VI. The district court denied petitioners' motion to dismiss on Eleventh Amendment grounds. See Pet. App. A4.[2] The district court held that the abrogation provision fell within Congress's power under Section 5 of the Fourteenth Amendment. Dist. Ct. Rec. 106-110. The district court subsequently granted petitioners' motion for summary judgment on the grounds that petitioners' decision not to admit respondent was unaffected by considerations of race and that respondent would have been denied admission regardless of the use of racial preferences. Pet. App. A22-A27.

3. The court of appeals affirmed the denial of petitioners' motion to dismiss on Eleventh Amendment grounds (Pet. App. A2-A10), but reversed the district

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[2] The district court did, however, grant petitioners' motion to dismiss respondent's monetary claims under 42 U.S.C. 1981 and 1983. Pet. App. A2.

court's grant of summary judgment to petitioners and remanded for further proceedings (*Id.* at A10-A19).

With respect to petitioners' Eleventh Amendment claim, the court of appeals ruled that the abrogation of the States' Eleventh Amendment immunity in 42 U.S.C. 2000d-7 was a valid exercise of Congress's enforcement authority under Section 5 of the Fourteenth Amendment. Pet. App. A4-A10. The court first concluded that Congress "unequivocally expresse[d] its intent to abrogate the immunity" in Section 2000d-7. *Id.* at A4.

The court then determined that Title VI constituted proper enforcement legislation under Section 5 of the Fourteenth Amendment, because the Act "prohibits precisely that which the Constitution prohibits in virtually all possible applications." Pet. App. A6. The court of appeals rejected petitioners' assertion that the abrogation was ineffective because Congress had intended only to exercise its powers under the Spending Clause when it enacted Title VI. *Id.* at A7-A10. The court explained that the question of Congress's authority to abrogate the States' immunity "is an entirely objective inquiry," and does not depend upon Congress's "recital[] of the power which it undertakes to exercise." *Id.* at A7 (internal quotation marks omitted). Furthermore, the court concluded, whatever Congress's intent was when it originally enacted Title VI in 1964, Congress "unquestionably enacted 42 U.S.C. § 2000d-7 with the 'intent' to invoke the Fourteenth Amendment's congressional enforcement power." Pet. App. A7-A9 & n.6 (citing legislative history references to exercise of the Section 5 power).

ARGUMENT

The court of appeals' ruling that Congress validly abrogated the States' Eleventh Amendment immunity through the enactment of 42 U.S.C. 2000d-7 is correct and consistent with the decisions of this Court and every other court of appeals to address the question. Accordingly, further review is unwarranted.[3]

In *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court held that the question whether Congress has abrogated Eleventh Amendment immunity in particular legislation contains two elements: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' * * * and second, whether Congress has acted 'pursuant to a valid exercise of power.'" *Id.* at 55 (quoting *Green* v. *Mansour*, 474 U.S. 64, 68 (1985)).

1. Petitioners do not dispute that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity in Title VI. Pet. 15. Nor could they. See *Lane* v. *Peña*, 518 U.S. 187, 200 (1996) (noting "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity in [42 U.S.C. 2000d-7(a)(1)]"); see also *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1996 (1998) (noting "Congress' abrogation of the States' Eleventh Amendment immunity under * * * 42 U.S.C. § 2000d-7").

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[3] Indeed, this Court has already denied another petition for a writ of certiorari that raised the identical question. See *Texas* v. *Hopwood*, No. 95-1773, Pet. at I, Question 4, cert. denied, 518 U.S. 1033 (1996). Petitioner identifies no changed circumstances that would warrant a different disposition of the present petition.

2. Petitioners argue instead (Pet. 14-17) that Congress lacked the legislative authority to effect the abrogation because Title VI is not an appropriate exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Seminole Tribe*, 517 U.S. at 59, 65-66 (Section 5 of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). That claim does not merit this Court's review for three reasons.

First, every court of appeals to address the question since *Seminole Tribe* has ruled that the Eleventh Amendment abrogation contained in 42 U.S.C. 2000d-7 is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. See *Doe* v. *University of Ill.*, 138 F.3d 653, 657-660 (7th Cir. 1998) (as applied to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*), petition for cert. pending, No. 98-126; *Crawford* v. *Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) (same); *Franks* v. *Kentucky Sch. for the Deaf*, 142 F.3d 360, 362-363 (6th Cir. 1998) (same); *Clark* v. *California*, 123 F.3d 1267, 1269-1271 (9th Cir. 1997) (as applied to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794), cert. denied, 118 S. Ct. 2340 (1998). Petitioners make no argument that Title VI is different in any relevant respect from those other statutory prohibitions of discrimination that are governed by the same abrogation provision. Moreover, the fact that the court of appeals' ruling reflects the first and only appellate court decision that we are aware of addressing Eleventh Amendment abrogation under Title VI after *Seminole Tribe* counsels strongly against this Court's review.

Second, the court of appeals' decision is correct and consistent with this Court's precedents. Title VI's

prohibition on race-based discrimination by state actors falls squarely within Congress's powers under Section 5 of the Fourteenth Amendment. See, *e.g.*, *City of Boerne* v. *Flores*, 521 U.S. 507, 518, 525-527 (1997); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 487-491 (1989) (opinion of O'Connor, J.); *Fullilove* v. *Klutznick*, 448 U.S. 448, 476-480 (1980) (opinion of Burger, C.J.).

Petitioners argue (Pet. 14-15) that, because Title VI's substantive provisions were enacted pursuant to the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, the abrogation provision cannot be considered an exercise of the Section 5 power. That claim is meritless. This Court has long recognized that

> [i]t is in the nature of our review of congressional legislation defended on the basis of Congress' powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection," * * * for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

EEOC v. *Wyoming*, 460 U.S. 226, 243-244 n.18 (1983) (citing *Fullilove*, 448 U.S. at 476-478 (opinion of Burger, C.J.), and quoting *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)).

Moreover, statutes can be enacted under "an amalgam of [Congress's] specifically delegated powers." *Fullilove*, 448 U.S. at 473. In *Fullilove*, the Court explained that the Public Works Employment Act of 1977 "by its very nature, is primarily an exercise of the Spending Power." *Ibid.* The Court nevertheless pro-

ceeded to analyze under Section 5 of the Fourteenth Amendment the Act's applicability to state and local grantees of federal funds. *Id.* at 476. Likewise, although Title VII of the Civil Rights Act of 1964 did not originally apply to the States and thus its substantive provisions reflected an exercise of Congress's Commerce Clause powers, this Court analyzed the scope of congressional power to enact the 1972 amendments, which extended Title VII's applicability to the States, under Section 5 of the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 452-456 & n.9. The court of appeals thus properly analyzed Title VI's abrogation provision as Section 5 legislation.[4]

Petitioners' argument (Pet. 16-17) that Section 5 legislation must be coercive rather than "[p]ermissive" and thus must not permit States to opt out of the prohibitions is clearly wrong. "*[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress*, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Croson*, 488 U.S. at 488 (quoting *Fullilove*, 448 U.S. at 483). Accordingly, Congress, under Section 5, "may *induce voluntary action* to assure compliance with existing federal statutory or constitutional antidiscrimination provisions." *Ibid.* (emphasis added); *Fullilove*, 448 U.S. at 483- 484 (same); see also *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582,

[4] In any event, as the court of appeals recognized (Pet. App. A8-A9 & n.6), the legislative history of Section 2000d-7 documents Congress's reliance on its Fourteenth Amendment powers. See also *Fitzpatrick*, 427 U.S. at 453 n.9 (citing legislative history illustrating that "Congress exercised its power under § 5 of the Fourteenth Amendment").

603 (1949) (opinion of Jackson, J.) ("In no matter should we pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."); *Doe*, 138 F.3d at 659-660 (Congress's extension of an "already existing federal funds framework" to the States does not undercut its "inten[t] to act pursuant to its acknowledged powers over State actors granted by Section 5 of the Fourteenth Amendment").[5]

Third, even were petitioners' abrogation arguments correct, petitioners waived any existing Eleventh Amendment immunity when they voluntarily accepted federal funds subject to Title VI's terms and conditions subsequent to the effective date of Section 2000d-7. This Court has repeatedly recognized that, "if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238 (1985). When Congress legislates pursuant to its powers under the Spending Clause, it may condition the acceptance and receipt of federal funds on a State's compliance with conditions that Congress could not impose unilaterally. *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987) (even "a perceived [federalism] limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants"); see also *New York* v. *United States*, 505 U.S. 144, 167, 171-172 (1992). One such

[5] Contrary to petitioners' suggestion (Pet. 16), moreover, Congress's decision to use a "carrot" (*ibid.*) rather than a stick to enforce the Fourteenth Amendment prohibition against race discrimination through Title VI has proven to be an extremely effective enforcement device: the Department of Education advises that all fifty States accept federal education funds that subject them to Title VI's requirements.

condition may be a waiver of sovereign immunity. See *Clark*, 123 F.3d at 1271 ("One way for a state to waive its immunity is to accept federal funds where the funding statute 'manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'") (quoting *Atascadero*, 473 U.S. at 247); see also *Atascadero*, 473 U.S. at 238 n.1 ("A State may effectuate a waiver of its constitutional immunity by * * * waiving its immunity to suit in the context of a particular federal program."); *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974) (a State may "by its participation in the program authorized by Congress * * * in effect consent[] to the abrogation of that immunity"). Indeed, in both *Atascadero* and *Edelman*, this Court's analyses turned, not upon the lack of congressional power to impose such a condition, but on the insufficient clarity of Congress's expression of its intent to do so. See *Atascadero*, 473 U.S. at 247; *Edelman*, 415 U.S. at 672-674; compare *Lane*, 518 U.S. at 198 (explaining that Congress enacted 42 U.S.C. 2000d-7 in response to *Atascadero* in order "to provide the sort of unequivocal waiver that [the Court's] precedents demand"). In short, requiring petitioners "to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on [state] sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999

(3)

Supreme Court, U.S.
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No. 98-1111

In The

Supreme Court of the United States

STATE OF TEXAS, et al.,

Petitioners,

v.

FRANCOIS DANIEL LESAGE

and

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT LESAGE IN OPPOSITION

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ARGUMENT

Respondent-plaintiff Lesage sued the petitioners-defendants, alleging that The University of Texas at Austin "impermissibly relied on race as a selection criterion by giving preferred status to Black and Hispanic applicants." Pet. App. A2. His "central claim is that he was subjected to unconstitutional racial discrimination by the University's evaluation of his admissions application." Pet. App. A14-A15.

The Fifth Circuit held that "diversity" is not a compelling state interest. Pet. App. A15. For reasons unknown to Lesage, the defendants have not sought review in this Court of that holding, which obviously resolves an important question of law.

The Fifth Circuit further held that "those applicants who had not yet been eliminated from consideration at the time racially preferential criteria were applied have suffered an implied injury" and are entitled to some form of relief, "even if their applications ultimately would not have resulted in admission under a nondiscriminatory admissions regime." Pet. App. A18. The holding is consistent with *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir 1996), *cert. denied*, 117 S.Ct. 1246 (1997) and the decisions of this Court cited therein. The defendants fail to identify (and Lesage's counsel could not locate) any judicial opinion that criticizes that recent Fourth Circuit decision.

In this case, the Fifth Circuit further held that "given the genuine, material factual dispute as to when the University first used race as a criterion to choose or exclude candidates to the counseling psychology program in relation to the point in time at which Lesage was

denied admission, it was error to grant summary judgment in favor of the state." Pet. App. A16-A17. The Fifth Circuit's opinion, which properly states the controlling rule of law, fully supports that factbound holding.

The defendants assert that the Fifth Circuit's opinion "attempts to dramatically change the landscape in race discrimination cases involving affirmative action" and "creates a lighter burden for non-minority plaintiffs complaining of discrimination than for minority plaintiffs making similar claims." Pet. 6 & 10.

The defendants cite ten judicial opinions in support of the foregoing assertions. Pet. 7-10. All are inapposite. See *Trans World Airlines v. Thurston*, 105 S.Ct. 613, 621-622 (1985) ("the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). In this case, Lesage produced direct evidence that a competitor for a governmental benefit was granted a racial preference. Pet. App. A16 ("Dr. Richardson admitted in his deposition that race was used as a factor during the winnowing down of the pool of applicants"). In the ten cited cases, the plaintiffs relied on circumstantial evidence of discrimination.

Absolutely nothing in the Fifth Circuit's opinion indicates that the case of a similarly situated "minority" plaintiff (i.e., one who presents direct evidence that a competitor for a governmental benefit was granted a racial preference) would be decided differently than this case. Cf. *Moore v. U.S. Dep't of Agriculture*, 993 F.2d 1222, 1224 (5th Cir. 1993) ("[t]he badge of inequality and stigmatization conferred by racial discrimination is a cognizable harm in and of itself providing grounds for

standing") and *Finch v. Mississippi State Medical Ass'n*, 585 F.2d 765, 772 (5th Cir. 1978) (upholding, against standing challenge, right of Dr. Britton to serve as representative of class of black doctors; alleged injury was deprivation on racial grounds of his ability to be considered for membership on state board of health).

The defendants further assert that "the Fifth Circuit rewrote the affirmative defense established by this Court in *Mt. Healthy School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977)." Pet. 6. The assertion is, at a minimum, an overstatement. First, although *Mt. Healthy* clearly held that a plaintiff could not be reinstated where the same discharge decision would have been made, it is not clear that this Court held that the "same decision" defense precluded liability. Second, *Mt. Healthy* involved free speech. Its applicability to claims of racial discrimination brought pursuant to 42 U.S.C. §§ 1981, 1983 and 2000d is therefore unclear.

The Fifth Circuit's approach is consistent with that of the Eight Circuit. See *Edwards v. Jewish Hosp. of St. Louis*, 855 F.2d 1345, 1348 (8th Cir. 1988) (42 U.S.C. § 1981 racial discrimination case; held that "same decision" finding did not preclude liability, "[r]ather, evidence that the employer would have discharged the employee in the absence of discrimination is properly considered in determining the appropriate remedy") and *Bibbs v. Block*, 778 F.2d 1318, 1322 (8th Cir. 1985) (en banc) (Title VII racial discrimination case; held that where race is "discernible" factor in adverse employment decision, liability under the statute is established; "[f]orcing Bibbs to be considered for promotion in a process in which race plays a

discernible part is itself a violation of the law, regardless of the outcome of the process").

The defendants improperly cite *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989) in support of their assertion that "[t]his Court has consistently reaffirmed the basic *Mt. Healthy* test that defendants can avoid liability on constitutional claims by meeting their burden of establishing that the plaintiff can show no ill consequence of the alleged deprivation." Pet. 12. First, *Price Waterhouse* did not involve a constitutional claim. Second, consistent with the plain language of Title VII, this Court held in *Price Waterhouse* that a substantive violation of the statute occurs only when consideration of an illegitimate criterion is the "but for" cause of an adverse employment action. Finally, that specific holding has been legislatively overturned (Pet. 13, n.1) and the legislative history of the Civil Rights Act of 1991 indicates that Congress intended to restore the law that applied prior to *Price Waterhouse* in cases such as *Bibbs v. Block*, which the House Report specifically cited. See H.R.Rep. No. 102-40(I) at 48, 1991 U.S.C.C.A.N. at 586.

The defendants further assert that because Title VI was enacted pursuant to the spending clause, Congress lacked the authority to abrogate the States' Eleventh Amendment immunity. Pet. 14. The issue is fully addressed by the Fifth Circuit's opinion (Pet. App. A2-A10) and the Brief for the United States In Opposition, and Lesage adopts by reference the arguments and authorities set forth therein.

CONCLUSION

Based on the foregoing, respondent-plaintiff Lesage respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Per Curiam

SUPREME COURT OF THE UNITED STATES

TEXAS ET AL. *v.* FRANÇOIS DANIEL LESAGE AND UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98–1111. Decided November 29, 1999

PER CURIAM.

Respondent François Daniel Lesage, an African immigrant of Caucasian descent, applied for admission to the Ph. D. program in counseling psychology at the University of Texas' Department of Education for the 1996–1997 academic year. In the year Lesage applied, the school received 223 applications for the program and offered admission to roughly 20 candidates. App. to Pet. for Cert. A–22. It is undisputed that the school considered the race of its applicants at some stage during the review process. The school rejected Lesage's application and offered admission to at least one minority candidate. Lesage filed suit seeking money damages and injunctive relief. He alleged that, by establishing and maintaining a race-conscious admissions process, the school had violated the Equal Protection Clause of the Fourteenth Amendment and Rev. Stat. §1977, 42 U. S. C. §1981, Rev. Stat. §1979, as amended, 42 U. S. C. §1983 (1994 ed., Supp. III), and 78 Stat. 252, 42 U. S. C. §2000d.

Petitioners sought summary judgment, offering evidence that, even if the school's admissions process had been completely colorblind, Lesage would not have been admitted. At least 80 applicants had higher undergraduate grade point averages (GPA's) than Lesage, 152 applicants had higher Graduate Record Examination (GRE) scores, and 73 applicants had both higher GPA's and higher GRE scores. App. to Pet. for Cert. A–23. In an affidavit, Professor Ricardo Ainslie, one of two members of the school's

admissions committee, stated that Lesage's personal statement indicated that he had "'a rather superficial interest in the field with a limited capacity to convey his interests and ideas,'" and that his letters of recommendation were "weak." *Id.*, at A–24. Ainslie stated that Lesage's application was rejected early in the review process, when the committee was winnowing the full application pool to a list of 40. *Ibid.* The District Court concluded that "any consideration of race had no effect on this particular individual's rejection," and that there was "uncontested evidence that the students ultimately admitted to the program ha[d] credentials that the committee considered superior to Respondent's." *Id.*, at A–26 to A–27. It therefore granted summary judgment for petitioners with respect to all of Lesage's claims for relief.

The Court of Appeals for the Fifth Circuit reversed. 158 F. 3d 213 (1998). The court did not review the District Court's conclusion that there was no genuine issue as to whether the school would have rejected Lesage under a colorblind admissions process. Instead, it held that such a determination was "irrelevant to the pertinent issue on summary judgment, namely, whether the State violated Lesage's constitutional rights by rejecting his application in the course of operating a racially discriminatory admissions program." *Id.*, at 222. An applicant who was rejected at a stage of the review process that was race conscious, the court reasoned, has "suffered an implied injury"—the inability to compete on an equal footing. *Ibid.* Because there remained a factual dispute as to whether the stage of review during which Lesage's application was eliminated was in some way race conscious, the court held that summary judgment was inappropriate and remanded the case for trial. *Ibid.*

Insofar as the Court of Appeals held that summary judgment was inappropriate on Lesage's §1983 action seeking damages for the school's rejection of his applica-

tion for the 1996–1997 academic year even if petitioners conclusively established that Lesage would have been rejected under a race-neutral policy, its decision is inconsistent with this Court's well-established framework for analyzing such claims. Under *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration. See *id.*, at 287. See also *Crawford-El* v. *Britton*, 523 U. S. 574, 593 (1998); *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr*, 518 U. S. 668, 675 (1996). Our previous decisions on this point have typically involved alleged retaliation for protected First Amendment activity rather than racial discrimination, but that distinction is immaterial. The underlying principle is the same: The government can avoid liability by proving that it would have made the same decision without the impermissible motive.

Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under §1983.

Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is "the inability to compete on an equal footing." *Northeastern Fla. Chapter, Associated Gen. Contractors of America* v. *Jacksonville*, 508 U. S. 656, 666 (1993). See also *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 211 (1995). But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same

decision absent the alleged discrimination precludes any finding of liability.

Lesage's second amended complaint sought injunctive relief and alleged that petitioners "have established *and are maintaining*, under color of the laws of the State of Texas, an affirmative action admissions program at the College of Education that classifies applicants on the basis of race and ethnicity." App. to Pet. for Cert. A–22 (emphasis added). But in deciding that summary judgment was improper, the Court of Appeals did not distinguish between Lesage's retrospective claim for damages and his forward-looking claim for injunctive relief based on continuing discrimination. Further, in their petition for certiorari, petitioners assert that "[t]he case at bar differs from *Adarand* because there is no allegation that the department of counseling psychology continues to use race-based admissions subsequent to the Fifth Circuit's *Hopwood* v. *State of Texas*[, 78 F. 3d 932, cert. denied, 518 U. S. 1033 (1996),] decision." Pet. for Cert 13. The brief in opposition does not contest this statement. It therefore appears, although we do not decide, that Lesage has abandoned any claim that the school is presently administering a discriminatory admissions process.

Insofar as the Court of Appeals held that petitioners were not entitled to summary judgment on Lesage's §1983 claim for damages relating to the rejection of his application for the 1996–1997 academic year even if he would have been denied admission under a race-neutral policy, its decision contradicts our holding in *Mt. Healthy*. We therefore grant the petition for writ of certiorari and reverse the judgment of the Court of Appeals in this respect.

Lesage also asserted claims under 42 U. S. C. §§1981 and 2000d (Title VI). Whether these claims remain, and whether Lesage has abandoned his claim for injunctive relief on the ground that petitioners are continuing to operate a discriminatory admissions process, are matters

open on remand. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.